IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JAVIER QUEREGUAN, Plaintiff, v. NEW CASTLE COUNTY, a political subdivision of the State of Delaware, Defendant and Third-Party Plaintiff, v. STATE OF DELAWARE, Third-Party Defendant.	)	Civil Action No. 20298-NC

MEMORANDUM OPINION

Submitted: June 15, 2006
Decided: August 18, 2006

Javier Quereguan, Wilmington, Delaware, *Pro Se Plaintiff*

Eric L. Episcopo, Esquire, NEW CASTLE COUNTY, New Castle, Delaware, *Attorney for Defendant and Third-Party Plaintiff*

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PARSONS, Vice Chancellor.

This opinion addresses two motions of Third-Party Defendant, the State of Delaware. First, the State has moved for reargument on the denial of its motion to dismiss Defendant, New Castle County's, third-party complaint (the "Third-Party Complaint"). Specifically, the State seeks to reargue the Court's interpretation of Article VIII, §§ 3 and 6 of the Delaware Constitution and whether the County's indemnity claim is ripe. Because the State has not demonstrated that the Court misapprehended the facts or law or misapplied the law in its prior ruling, the Court denies the motion for reargument.

In addition, the State filed a Motion to Sever and Motion to Transfer the Third-Party Complaint of New Castle County ("Motion to Sever and Transfer"). It argues both that trying the County's case against it with Plaintiff's case against the County will confuse the Court and prejudice it and that this Court lacks jurisdiction. For the reasons set forth below, the Court denies this motion, as well.

I. FACTS[1]

Plaintiff, Javier Quereguan, owns property located at 320 Maple Avenue in Wilmington, Delaware (the "Quereguan Property"). The Absalom Jones Community Center property (the "Center Property") borders the rear of the Quereguan Property. Quereguan alleges that water drained through the Center Property's retaining wall and

[1] For a more detailed recitation of the facts *see Quereguan v. New Castle County*, 2004 WL 2271606 (Del. Ch. Sept. 28, 2004).

damaged his house and yard. Quereguan seeks monetary relief and an injunction ordering the wall to be fixed to stop further damage.[2]

In January 2003, Quereguan filed a Complaint in Superior Court against the Red Clay Consolidated School District ("Red Clay"), the owner of the Center Property at that time. Quereguan's suit also named the County and the Center Property's tenant, the State, as defendants. The State purchased the Center Property from Red Clay in 2003 pursuant to the Bond and Capital Improvements Act of the State of Delaware for the Fiscal Year Ending June 30, 2003 (the "Bond Bill").[3]

The Governor signed the Bond Bill into law on July 1, 2002. Section 56 of the Bond Bill authorized the State to purchase the Center Property if it met certain conditions. One of those conditions was that "liabilities that may be associated with drainage problems that occurred *prior to the date of transfer* that result in flooding of properties adjacent to the Absalom Jones School shall not be transferred to either the Department or the State."[4]

On October 15, 2002, anticipating the State's purchase of the Center Property, the State and the County executed a lease agreement (the "Lease") for a term from August 1, 2002 to July 31, 2007. Under the Lease agreement the State bears responsibility for services related to: (1) utilities, other than telephone; (2) janitorial and custodial services;

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2 Quereguan has moved to join his wife and daughter as additional plaintiffs in this action. That motion remains pending.

3 State's Mot. for Rearg. Ex. 1.

4 *Id.* (emphasis added).

(3) repair and maintenance of heating, air conditioning, plumbing, electrical and lighting systems; (4) exterior, structural, grounds, parking area repair and maintenance, including snow and ice removal; and (5) ordinary repair and maintenance to the interior and exterior of the building.[5] In paragraph 13 of the Lease, the State noted that it was "sovereignly immune from liability claims."

II. PROCEDURAL HISTORY

In January 2003, Quereguan filed his original complaint against the State, the County and Red Clay in Superior Court. All three defendants moved to dismiss. Concluding that it lacked jurisdiction to grant Quereguan equitable relief, the Superior Court transferred the case to the Court of Chancery.

In June 2004, this Court held argument on defendants' motion to dismiss. In September 2004, the Court dismissed Quereguan's claim for monetary relief against the State on sovereign immunity grounds but refused to dismiss his claim for injunctive relief.[6] Subsequently, the State moved for reargument, which was granted. As a result, the Court also dismissed Quereguan's claim for injunctive relief against the State.[7]

On June 14, 2005, the County filed a Third-Party Complaint against the State. The Third-Party Complaint avers that the State has had complete ownership of the Center Property since August 1, 2002. It further alleges that if Quereguan prevails in his claims

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5 Lease ¶ 5. A copy of the Lease appears as Ex. A to Def.'s Third-Party Compl. against Third-Party Def. State of Delaware (the "Third-Party Complaint").

6 *Quereguan v. New Castle County*, 2004 WL 2271606 (Del. Ch. Sept. 28, 2004).

7 *Quereguan v. New Castle County*, 2004 WL 3038025 (Del. Ch. Nov. 24, 2004).

against the County, the State is liable to the County in connection with the Lease "for any and all alleged damage to Plaintiff's property occurring after August 1, 2002."[8] The County also cross-claimed for contribution and indemnification from the State under the Uniform Contribution Among Tort-Feasors Law ("UCATL"),[9] if the County is held liable to Quereguan. The State moved to dismiss the Third-Party Complaint. After briefing and argument the Court issued an opinion on April 24, 2006 (the "Opinion"), denying that motion.[10] The State now seeks reargument of its motion to dismiss.

In addition, on May 1, 2006, the State filed its Motion to Sever and Transfer. Both the County and Quereguan oppose that motion.

III. ANALYSIS

A. The Motion for Reargument

1. Legal standards

The standard applicable to a motion for reargument is well settled. To obtain reargument, "the moving party [must] demonstrate that the Court's decision was predicated upon a misunderstanding of a material fact or a misapplication of the law."[11]

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8 Third-Party Compl. ¶ 7. The County also asserts that the State may be liable for injunctive relief, as well. *Id.* ¶ 8.

9 10 *Del. C.* §§ 6301–6308.

10 *Quereguan v. New Castle County*, 2006 WL 1215193 (Del. Ch. Apr. 24, 2006).

11 *Goldman v. Pogo.com Inc.*, 2002 WL 1824910, at * 1 (Del. Ch. July 16, 2002).

Also, any misapprehension of fact or law must be such that "the outcome of the decision would be affected."[12]

Reargument under Court of Chancery Rule 59(f) is only used to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion.[13] Furthermore, a motion for reargument will not be granted when "a party merely restates its prior arguments."[14]

The State does not argue that the Court misapprehended material facts. Therefore, the Court turns to the applicable law.

2. Did the Court misapply the Delaware Constitution?

a. Article VIII, § 3

The State argues that the Court misapplied the law by limiting the applicability of Article VIII, § 3 of the Delaware Constitution of 1897 to loans. Article VIII, § 3 provides:

> No money shall be borrowed or debt created by or on behalf of the State but pursuant to an Act of the General Assembly, passed with the concurrence of three-fourths of all members elected to each house, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay existing debts; and any law authorizing the borrowing of money by or on behalf of the State shall specify the purpose for which the money is to be borrowed, and the money so borrowed shall be used exclusively for such purpose . . . .

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12 *Stein v. Orloff*, 1985 WL 21136, at *2 (Del. Ch. Sept. 26, 1985).

13 *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995) (citing *Maldonado v. Flynn*, 1980 WL 272822 (Del. Ch. July 7, 1980)).

14 *Id.*

Thus, the prohibition in Article VIII, § 3 only applies if the State borrows money or creates debt without the approval of three-fourths of the General Assembly and the Governor.

The State contends that the application of § 3 is not limited to State borrowing for public purposes because such a construction would render the words, "or debt created" mere surplusage, and contravene principles of statutory construction. Moreover, the State asserts that because the phrase "or debt created" is not modified in any way to limit it to bond issues, it applies to any liability on public finances including the indemnity claim asserted here.

Black's Law Dictionary defines borrowing as "tak[ing] something for temporary use" or receiving "money with the understanding or agreement that it must be repaid, usually with interest."[15] Whereas "debt" is either: (1) "[l]iability on a claim; a specific sum of money due by agreement or otherwise"; (2) the "aggregate of all existing claims against a person, entity or state"; (3) a "nonmonetary thing that one person owes another, such as goods or services"; or (4) a "common-law writ by which a court adjudicates claims involving fixed sums of money."[16]

The County's third-party claim seeks to enforce the State's obligations under the Lease it entered into with the County. The Opinion recognizes that the State could be liable to the County for breaches of the Lease and for contribution or indemnification for

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15 BLACK'S LAW DICTIONARY 196 (8th ed. 2004).

16 *Id*. at 432.

resultant damage to the County caused in whole or in part by those breaches. The Bond Bill makes clear, however, that such liability would not include "liabilities that may be associated with drainage problems that occurred prior to the date of the transfer that result in flooding of properties adjacent to the [Center Property]." The question presented by the State's motion, therefore, is whether Article VIII, § 3 or 6 prohibits the State from incurring such an obligation without an act passed by the General Assembly.

As to Article VIII, § 3, the State argues that the language limiting the State's ability to create a debt applies to the obligations reflected in the Lease and any contractual indemnification or contribution rights that might flow from the Lease. To the extent the Opinion can be read to limit the reach of Article VIII, § 3 to loans only, the language may be too broad. The prohibition on the creation of debt by or on behalf of the State in that section appears to apply to more than just loans. For example, in the *Opinion of the Justices*,[17] the Supreme Court recognized the applicability of Article VIII, § 3 to pledging the credit of the State to guarantee industrial bonds issued under the auspices of an Industrial Building Commission. The prohibition on debt creation may extend to other actions, as well.

For purposes of the pending motion for reargument, however, that is not material. The key question is whether Article VIII, § 3 of the Delaware Constitution prohibits the State from entering into contracts and from being liable under those contracts, if it fails to perform its agreed obligations, without prior approval of three-fourths of the General

[17] 177 A.2d 205, 209 (Del. 1962).

Assembly. After reviewing the State's motion and its cited authorities, I remain convinced that it does not. The additional facts that the State waived sovereign immunity when it entered into the Lease, except for liabilities associated with drainage problems that occurred before the date of the transfer to the State, and the definition of "debt" in Black's Law Dictionary does not appear to encompass indemnity claims of the type asserted here further support this conclusion. Thus, even if meritorious, the State's criticism of the language of the Opinion suggesting that Article VIII, § 3 might be limited to loans provides no basis for reargument, because it does not affect the outcome of the decision.[18]

In addition, the State's broad definition of "debt" and "borrowing" would create unfair and unexpected results. If "debt" includes consequential damages from a breach of any contract to which the State is a party, the State could enter into a contract related to its day-to-day operations, breach it and invoke the Delaware Constitution as a shield against consequential damages. As I read it, the Delaware Constitution does not envision such a result. Therefore, the Court concludes that it did not misapply the law when it held that potential liability for consequential damages from an alleged breach of contract by the State does not amount to "debt" or "borrowing" within the meaning of Article VIII, § 3 of the Constitution.

[18] *Stein v. Orloff*, 1985 WL 21136, at *2.

b. Article VIII, § 6

The State also argues that Article VIII, § 6 of the Delaware Constitution prohibits the County's indemnification claim because the General Assembly did not appropriate funds for indemnification in the Bond Bill. In arriving at this conclusion the State relies on the Bond Bill's requirement that "[l]ease agreements must be accepted and executed by a sufficient number of tenants so that the aggregate rental income in other than the first year of ownership by the Department is at least equal to the estimated annual operating costs of the facility" before the State takes title to the Absalom Jones School. The State asserts that this provision, when read in the context of the Bond Bill as a whole, requires that the Absalom Jones Center pay for itself through leasing, while disclaiming "liability that may be associated with drainage problems that occurred prior to the date of the transfer of the property."[19]

In my opinion, the State misconstrues the Bond Bill in terms of its application to the facts of this case. Nothing in the Bond Bill indicates an intent by the General Assembly to provide immunity to the State for breaches of the Lease and for resultant damage to the County caused by drainage problems on the Quereguan Property attributable to such breaches after the date of transfer. The cited section of the Bond Bill only requires that the State execute enough lease agreements so that the aggregate rental income at least equals the *estimated annual operating costs* of the facility. There is nothing in the record from which one could infer that, even if operating costs included the

[19] State's Mot. for Rearg. ¶ 4 (footnote omitted).

cost of the State's potential liability to the County stemming from the State's breach of the Lease, the estimated annual operating costs would exceed the aggregate rental income.

Additionally, the General Assembly arguably allocated for indemnification when it authorized the State's agent to enter into the Lease. By authorizing the State to contract, it accepted the possibility that damages that might result from a breach *after* the Lease went into effect. If the State were correct, the General Assembly and the Governor would have to approve detailed aspects of every contract in advance. I do not consider that consistent with the intent of Article VIII, § 6.

Furthermore, I disagree with the State's argument that *Opinion of the Justices*[20] supports its position. In that case the Delaware Supreme Court held that a statutory direction to the State Treasurer to pay funds from the Treasury to satisfy any deficiency in a development corporation's ability to pay off bonds in default violated Article VIII, § 6 because it constituted a withdrawal and payment of funds otherwise than by an appropriation act of the General Assembly. Payment of State funds to satisfy a defaulted bond of a development corporation is not analogous to the State being held to its own obligations under a properly authorized Lease, subject to specific limitations on liability set forth in the Bond Bill.

Therefore, the Court did not misapply the law in determining that Article VIII, §§ 3 and 6 do not bar the County from obtaining indemnification from the State.

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[20] 177 A.2d 205, 210 (Del. 1962).

3. Is the County's indemnification claim ripe?

The State contends that the County's indemnification claim is not ripe for adjudication.[21] Specifically, the State argues that because common law indemnity claims only accrue when the party seeking indemnification pays damages to the injured party, the County cannot seek indemnity from the State until it pays Quereguan.[22]

Under Delaware law claims for common law indemnity do not accrue until the indemnitee can be confident that any claim against him has been resolved with certainty.[23] This case, however, does not involve common law indemnity; rather, it involves contractual indemnity. In concluding that the County could hold the State liable under an indemnity or contribution theory this Court relied on *Di Ossi v. Edison*.[24] There, the Court held the defendant could be liable for contractual indemnity, not common law indemnity.[25] Similarly, in this case I recognized the possibility of a contractual indemnity claim, not a common law one.

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21 State's Mot. for Rearg. ¶ 5.

22 *Id.*

23 *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *3 (Del. Ch. Jan. 24, 2005).

24 1989 WL 135755 (Del. Super. Oct. 25, 1989).

25 *Id.* at *3. As the Court noted, the plaintiff in *Di Ossi* could not bring a common law indemnity claim. "While 19 *Del. C.* § 2304 provides that the payment of worker's compensation benefits extinguish all common law liability of the employer and forecloses claims for contribution based on a joint tortfeasor relationship, Delaware law recognizes claims for indemnification by third-parties against the employer based on breach of contract." *Id.*

A key difference between a "common law indemnification," which is defined as a general right of reimbursement for debts owed to third parties by the indemnifier as a secondarily liable party, and "contractual indemnification" is that common law indemnification involves the responsibility to pay for another's liability.[26] Thus, a cause of action for common law indemnification does not accrue until after the party seeking indemnification has made payment to the third party and the dispute with that party is finally concluded.[27] There is no such requirement for a contractual indemnity claim.[28] Consequently, I find the State's ripeness and other arguments that hinge on the classification of the County's claim as a "common law" indemnity claim unpersuasive and inapplicable.

4. Can the County seek contribution from the State?

The State argues that contribution only applies if there is several liability for the same injury to the plaintiff. The State made this argument in support of its motion to dismiss.[29] I considered it in making my decision and found it unpersuasive.[30] A motion

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26 *Levy v. Hayes Lemmerz Int'l, Inc.*, 2006 WL 985361, at *11 (Del. Ch. Apr. 5, 2006).

27 *Id.*

28 *Id.*; *Certainteed*, 2005 WL 217032, at *3.

29 "No contribution exists unless there is common *liability* to an injured person and unless that injured person has a possible remedy against two or more persons. It is joint or several *liability* which determines the right of contribution." State's Reply Br. in Supp. of its Mot. to Dismiss at 6.

30 *Quereguan*, 2004 WL 2271606, at *7-8.

for reargument will not be granted when a party merely restates its prior arguments.[31] Having reviewed the submissions on the State's motion for reargument, I find no basis for concluding that the Court misapplied the law on the contribution issue.

B. The Motion to Sever and Transfer

The State also has moved to sever the County's Third Party Complaint pursuant to Court of Chancery Rules 14 and 42(b) and transfer it to the Superior Court. It argues the Third-Party Complaint should be severed because 1) the issues in Quereguan's Complaint and the County's Third-Party Complaint do not arise from the same transaction or occurrence and, therefore, no question of law or fact common to all parties exists, 2) hearing Querequan's evidence about occurrences after the State purchased the Center Property would cause confusion and prejudice because that evidence is not at issue between Quereguan and the County and 3) a separate trial would be convenient and simplify addressing the breach of contract issue.[32] Intertwined in the State's argument to sever is its contention that this Court lacks jurisdiction to hear the County's claim against it because the claim is a purely legal one.

Rule 14 allows any party to move for the severance of a third-party claim, while Rule 42(b) provides:

> The Court in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim or third-party claim, or any separate issue

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31 *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d at 506.

32 Mot. To Sever & Transfer ("MST") ¶¶ 6–8.

> or of any number of claims, cross-claims, counterclaims or third-party claims or issues.

These rules notwithstanding, Delaware prefers the efficient adjudication of claims.[33] The Delaware courts have recognized that severance of issues for separate trials should be granted sparingly because one trial "tends to lessen the delay, expense and inconvenience to all concerned."[34] In fact, the primary purpose of Rule 14 is the avoidance of "circuity of action and multiplicity of suits."[35] Rule 42(b) recognizes that aim and favors "the expeditious resolution of all interrelated claims and issues in a single proceeding."[36] Thus, separate trials "should not be ordered unless such a disposition is clearly necessary."[37]

To determine if separate trials, or by analogy severance, are necessary, courts consider numerous factors. These include "the complexity of the litigation and the need for different proof," whether "discovery on certain claims would delay a single trial," whether "different counsel would probably try the various claims" and whether "prejudice would result from separate trials."[38] Delaware courts have denied severance

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33 *Preston v. Preston*, 1980 WL 268080, at * 1 (Del. Ch. July 31, 1980).

34 *Id.*

35 *Novak v. Tigani*, 110 A.2d 298, 299 (Del. Super. 1954).

36 *Delmarva Drilling Co. v. Am. Water Well Sys. Inc.*, 1988 WL 7396, at *6 (Del. Ch. Jan. 26, 1988).

37 *Preston*, 1980 WL 268080, at *1.

38 *Am. Home Prods. Corp. v. Norden Labs., Inc.*, 1992 WL 368604, at * 7 (Del. Ch. Dec. 11, 1992) (internal citation omitted).

when testimony would be duplicated or if the facts and issues "do not appear to be distinctly complicated."[39]

The issues in this case are not distinctly complicated. The breach of contract claim requires a relatively straightforward determination whether the State maintained the exterior of the Center Property pursuant to the Lease and, if not, what damages resulted. Because the contract claim requires a straightforward determination and conceivably could involve some overlapping facts as to Quereguan's claims against the County, the Court can efficiently adjudicate the third-party claims and Quereguan's claims against the County in a single proceeding.

Moreover, a second trial would duplicate evidence and testimony. The County's breach of contract claim and Quereguan's claims against the County arise from a common occurrence or transaction, *i.e.*, water allegedly flowing from the Center Property's retaining wall on to Quereguan's Property at various times. Thus, the parties will likely present evidence of water damage both before and after the State took ownership of the Center Property. Severing the claims against the State and necessitating two trials would be inefficient and cause extra expenditures.

Finally, the State has not demonstrated that any prejudice would inure to it if this Court tries both sets of claims in this action. The State's citation to a case in which the Superior Court severed the *jury* trial of one bad faith claim from right to coverage claims

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[39] *Id.* at *6 (citing *Delaware Chems., Inc. v. Reichold Chems., Inc.*, 124 A.2d 553, 555 (Del. Ch. 1956); *Delmarva Drilling Co.*, 1988 WL 7396, at *6–7).

asserted against 37 different insurers[40] is neither apposite nor persuasive. This Court frequently tries complicated cases involving multiple claims against multiple defendants. The trial of the relatively uncomplicated, although different, claims against the two defendants here will not confuse this Court. For all of these reasons, the State has failed to show that severance of the County's third-party claim is clearly necessary.

The State next argued that this Court lacks jurisdiction over the Third-Party Complaint because it seeks only the legal remedy of money damages. The State's argument fails for two reasons. First, the County appears to request equitable relief.[41] Because the contract between the State and the County assigns responsibilities and shifts liability, the County seeks specific performance of those assignments in the event Quereguan prevails against the County.[42] The Court of Chancery unquestionably has jurisdiction over claims for equitable relief, such as specific performance.[43] Moreover, a transfer of the County's claim to the Superior Court would result in multiple actions, require duplication of judicial effort and delay provision of any relief that might be due the claimant.

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40 MST ¶ 7.

41 *See* Third-Party Compl. ¶ 8 ("To the extent the Court orders any injunctive relief, the State, as the sole owner and responsible party for the portion of the [Center Property] allegedly causing damage to Plaintiff's property, is the party subject to any appropriate injunctive relief.").

42 *Id.* at ¶¶ 1–8.

43 Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 2-3 at 2-44 (2006).

Second, to the extent that the County seeks only money damages or has an adequate remedy at law, the Court has discretion to adjudicate legal claims under the clean-up doctrine. It is well settled that "when equity obtains jurisdiction over some portion of the controversy it will decide the whole controversy and give complete and final relief, even though that involves the grant of a purely legal remedy such as a money judgment."[44] The clean-up doctrine "serves to avoid piecemeal litigation, to conserve scarce judicial resources, to limit costs to litigants and the public, and to decrease the risk of inconsistent verdicts."[45] This Court unquestionably has jurisdiction over Quereguan's claims against the County. Moreover, as previously stated, the County's third-party claim against the State, at least in part, arises out of the same transaction or occurrence that is the subject of Quereguan's claims. Thus, in light of the policies underlying the clean-up doctrine, the Court has determined to exercise its discretion to hear the County's claim against the State, even if that claim were deemed to be purely legal. In so doing, the Court avoids piecemeal litigation of this controversy, conserves judicial resources and limits the costs to the public and the County.

IV. CONCLUSION

For the foregoing reasons, the State's motions for reargument and to sever and transfer are DENIED.

IT IS SO ORDERED.

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[44] *Id.* § 2-4 at 2-63 (quoting *Wilmont Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964)).

[45] *Id.* § 2-4 at 2-65 (citing cases).